

1 August 2018

David Bennett MP
Chairperson
Primary Production Committee
Private Bag 18041
Wellington 6160

Dear Mr Bennett

Consumers' Right to Know (Country of Origin of Food) Bill 2016: Commerce Commission submission

1. Thank you for the opportunity to provide comment on the Consumers' Right to Know (Country of Origin of Food) Bill 2016 (the **Bill**) which, if enacted, will empower the Minister to introduce mandatory origin labelling for certain types of food sold in New Zealand.
2. Please be aware that this submission is provided by Commerce Commission (**Commission**) staff, as the consultation opportunity provided has not allowed us to obtain the endorsement or views of our members.
3. The Commerce Commission is New Zealand's primary competition, consumer and regulatory agency. We enforce legislation that promotes competition in New Zealand markets and prohibits misleading and deceptive conduct by traders.
4. We have focussed our submission on the enforcement considerations that might arise from enactment of the Bill, rather than on policy or design questions, although at some points these considerations intersect.
5. We note that the addition of a further consumer information standard enforceable by the Commission, as proposed by the Bill, may have resourcing implications and create a need for accompanying funding.
6. Please note that on 18 May 2017 we provided the Committee with a more comprehensive submission on our enforcement history in respect of food origin representations, and our perspectives on the merits of introducing reform in this area. Our previous submission is reproduced at **Attachment A**.

Enforcement of origin labelling

7. As drafted, the Bill's relationship with the Fair Trading Act 1986 (the **FTA**) would provide the Commission with two enforcement pathways:

- 7.1 **Breach of the Consumer Information Standard:** we could enforce breaches of the Consumer Information Standard (the **standard**) that this Bill empowers the Minister to promulgate. The FTA prohibits a person from supplying goods or services, or offering or advertising to supply them, unless that person complies with the applicable standard.¹
- 7.2 **False or misleading representations:** we could enforce – as currently - s 13(j) of the FTA, which prohibits traders from making false or misleading representations concerning the place of origin of goods.²
8. Our choice between the two pathways would typically depend upon the scale and seriousness of the alleged breach at issue in a given investigation. We have published *Enforcement Response Guidelines* which explain this decision-making³ and the relevant considerations. Generally, we can observe that enforcing origin mislabelling as a breach of the standard rather than as misrepresentation carries a much lower maximum penalty, so is suited to cases that are in our opinion less serious.⁴
9. At Select Committee on 1 June 2017 we expressed support of food origin labelling regulation through the making of a standard, as we were concerned that regulation might otherwise fall outside of the FTA and create unnecessary enforcement overlap or complication. Accordingly, we reinforce now that we see the overall direction of this Bill as an effective way to mandate origin labelling regulation, without impairing FTA enforcement. We support the Bill generally.

Scope of the Bill and definitions

10. We are aware that the Bill would create an empowering statute, and understand that it is drafted without great specificity because definitions and delineation are left to be included in any standard made under the Act. Nonetheless, we thought this a suitable time to indicate the scope and definition questions that we have about the proposed regime.

“Regulated food”

11. We are unsure as to whether the Bill will entirely satisfy consumer concerns about food origin, when **regulated food** carries the meaning given in clause 5(3).
12. As the Bill is currently drafted, regulated food is food that is:

¹ Section 28(1).

² Examples of cases that we have brought under s13(j) include *Commerce Commission v New Zealand Nutritionals (2004) Ltd* [2016] NZHC 832 and *Commerce Commission v Brownlie Brothers Limited* DC Napier CRI 2003-041-003200 [29 March 2004].

³ Available online at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>

⁴ Breaches of the standard can themselves be enforced either by the Commission issuing an Infringement Notice or by us prosecuting the infringement offence through the Courts: s 40B. An Infringement Notice will carry a maximum infringement fee of \$2,000 (or some lesser amount as specified by Regulation.) A Court may impose a fine of up to \$30,000 (company) or \$10,000 (individual) for cases that we prosecute. In contrast, breaches of s13(j) carry a maximum penalty of \$600,000 (company) or \$100,000 (individual.)

- 12.1 only one type of fruit, vegetable, meat, fish, or seafood; and
 - 12.2 fresh or frozen but not, for example, dried, cured, or pickled; and
 - 12.3 no more than minimally processed (for example, by being cut, minced, filleted, or surface treated); and
 - 12.4 supplied at retail, including online; and
 - 12.5 not supplied for immediate consumption or at a fundraising event; and
 - 12.6 packaged or unpackaged.
13. We receive complaints, and have in the past investigated, origin claims about foods that would arguably not be covered by the definition above. Examples include:
- 13.1 **Bacon/ Ham:** as cured products, its origin would not be required in labelling. Consumers, however, are in our experience just as eager to know the origin of bacon as they are for other pork products, like chops. We have previously warned traders selling bacon and ham products made from imported pork, where the labelling implied that these products were made from New Zealand pork. The Commission's view was that it was misleading to represent such goods as New Zealand products, merely because the curing or smoking processes were carried out in New Zealand, since many consumers would understand from such labelling that the product was made from New Zealand pork.
 - 13.2 **Nuts and seeds:** the definition of foods as "only one type of fruit, vegetable, meat, fish, or seafood" does not appear to capture nuts and seeds which do not fit neatly into any of the listed categories. In our view, nuts and seeds are a single type of food of which consumers are likely to want to know the origin.
 - 13.3 **Fruit juice:** we anticipate that this would be considered "more than minimally processed", so its origin would not be required in labelling. Consumers are in our experience very concerned to know the origin of the fruit that is sold in juice form. The Commission has previously taken a number of enforcement actions, including litigation, where traders have implied that their fruit juice was New Zealand made, when that was not the case.
 - 13.4 **Milk powder:** again, this would be "more than minimally processed." Consumers are in our experience concerned to know the origin of the milk, not least because they sometimes have concerns as to its sanitary production and safety.
 - 13.5 **Bee pollen, Fish Oil etc:** the same concerns apply, and additionally many consider these as nutritional supplement and not merely a food.

14. It remains a policy question for the Committee how broadly “regulated food” is defined, and what regulations might cover. Our experience is that consumers may struggle to understand and support some of the distinctions being drawn.

Processed food

15. In our view, the term **minimally processed** in clause 3(c) is unclear and apt to cause confusion, which is not remedied by the examples given in the clause.
16. The term might be interpreted as covering food on a spectrum between cut, sliced or minced to foods that are tinned or preserved in brine or water. Greater definition of the kind of processing that is considered ‘minimal’ would be helpful.
17. The MBIE Summary of the Draft Consumers’ Right Bill provides Examples of Foods not Covered, and in some cases we are uncertain from the Bill why these are thought to be outside the scope of regulated food. In particular, we query why tinned vegetables or fruit are thought not to be covered.
18. In our understanding, many tinned foods are fresh fruit, meat (eg chicken), fish (eg tuna) or vegetables that are tinned in water. Tinning/ canning would seem to be “**packaging**” under clause 3(f) and so might well be covered by the Bill.

Takeaway and fundraising sales

19. It is plain from clause 3(e) that the Bill only applies to food that is supplied, or offered or advertised for supply, at retail and not to food that is to be sold “**for immediate consumption**” at a restaurant, cafeteria, takeaway shop, canteen, or similar place or caterer, or at a fundraising event.
20. We query whether the examples in 3(e) are sufficiently clear in respect of dairies, supermarkets, service stations, farmers’ markets etc where fresh fruit can – for example – be purchased for immediate consumption.
21. We infer that retailers selling fresh fruit in large quantities – say, supermarkets and farmers’ markets – *are* expected to provide origin labelling, but the same might not be expected of dairies and service stations, who typically sell smaller quantities. We recommend increased clarity of this definition.
22. We also query whether “**fundraising event**” in clause 3(f) is a term of sufficient clarity. If left undefined, there might be opportunities for traders who apply regulations to avoid them by creating a fundraising context around their sales of regulated food.

“Place” of origin

23. It may be intended for regulations to define what a “place” of origin means. This would be essential, as in our view “place of origin” is term lacking clarity.
24. Section 13(j) of the FTA prohibits false and misleading representations about the *place* of origin of goods. We have tended to treat this as meaning ‘country’ of origin, although the term is defined in the Act as follows:

place includes any premises, building, aircraft, ship, carriage, vehicle, box, or receptacle
25. If regulations permitted the labelling of an (undefined) place as an alternative to country, this may allow traders to disclose only the specific geographic location from which that product comes without disclosing the country. This may lead to consumer confusion.
26. For example, a trader who sells lamb farmed in Cambridge, England may fulfil his or her obligations under the proposed consumer information standard by listing the place of origin of his lamb simply as ‘Cambridge’. In this situation the trader has complied with its labelling requirements, even though consumers may wrongly believe that the lamb is from Cambridge, New Zealand.
27. Further, the inclusion of ‘place of origin’ is inconsistent with other consumer information standards which mandate explicitly for the country of origin to be disclosed. For example, the Consumer Information Standards (Country of Origin (Clothing and Footwear) Labelling) Regulations 1992 states that “every article of clothing and footwear to which these regulations apply that is supplied, offered for supply, or advertised for supply shall be labelled or marked so as to show the *country in which the article was made or produced*”.
28. For the reasons above we invite the Committee to consider whether the Bill and the regulations should be narrowed to only include the country of origin of the food. In our opinion this is likely to be the information that is most important to consumers. Traders who would wish to provide more specific information, say regional details, would of course be free to do so in addition.

Resource and funding implications

29. The addition of a further consumer information standard enforceable by the Commission may have resourcing implications and create a need for accompanying funding.
30. We envisage that our enforcement would be largely complaint-based, with some proactive inspection work by Commission staff (as presently for unsafe products, vehicle CIN notices and other Consumer Information Standards).

Further information

31. We are available to speak to the Committee about our submission if that will be of assistance. To arrange a meeting, please contact Yvette Popovic, Team Leader, Advocacy on 04 924 3771 or by email at yvette.popovic@comcom.govt.nz.

Yours sincerely



Ritchie Hutton

Head of Strategy, Intelligence and Advocacy
Competition and Consumer Branch

Attachment A: Commerce Commission submission to Select Committee 18 May 2017

18 May 2017

Ian McKelvie MP
Chairperson
Primary Production Committee
Private Bag 18041
Wellington 6160

Dear Mr McKelvie

Commerce Commission submission on the Consumers' Right to Know (Country of Origin of Food) Bill 2016

32. Thank you for the opportunity to provide comment on the Consumers' Right to Know (Country of Origin of Food) Bill 2016 (the **Bill**), which if enacted will introduce mandatory country of origin labelling for single component foods (both packaged and unpackaged) in New Zealand.
33. The Commission is New Zealand's primary competition, consumer and regulatory agency. We enforce legislation that promotes competition in New Zealand markets and prohibits misleading and deceptive conduct by traders.
34. As an enforcement agency, we do not take a position on the policy question as to whether this Bill should become law.
35. We receive few complaints on the issue of food country of origin labelling, which may be because falsity is hard to detect, or because the problem is not widespread. On the information that accompanies the Bill, we are unable to assess the scale of any problem.
36. Rather, we are focussing our submission on the practical enforcement considerations that might arise from enactment of the Bill as drafted, and we identify some issues for further consideration and propose some drafting changes to avoid enforcement difficulties if the Bill progresses into law.

Importance of clear information

37. It is true that consumers can make more informed purchasing decisions when provided with accurate information about the country of origin of food. This is also true of other products, and as the Explanatory Note to the Bill records, some other products are already required to state their country of origin (footwear and clothing). Accordingly, we are supportive of clauses 3 (Purpose of the Act) and 5

(Principles which apply). We also recognise the observations in the Explanatory Note as to the many reasons why consumers consider it important to know where their food comes from. This accords with our understanding of consumer preferences.

38. We also note that a mandatory requirement to identify the country of origin of single component foods may well lessen the chances that food labels would be misleading as to the country of origin. Once prompted to include a label denoting country of origin, it seems likely that most traders would state the origin accurately. For example, a requirement to label a product as imported from a particular country may reduce the likelihood that a trader would also include more subtle representations with the potential to mislead as to a different country of origin, such as the inclusion of a New Zealand flag.
39. We disagree, however, with the Explanatory Note to the Bill where it states that:
- Many consumers assume, in the absence of country of origin labelling that traditional foods such as meat, fruit, fish, and vegetables are produced in New Zealand. In this situation the lack of country of origin labelling can be regarded as misleading and deceptive.
40. We do not have any information to support this statement about consumers' assumptions. In cases that we have taken concerning country of origin labelling,⁵

⁵ Cases include:

- *Commerce Commission v Topline International Limited and Jeffrey Bernard Cook* CRI-2016-004-012802 [2017] NZDC 9221 (bee pollen labelled as made in New Zealand and containing New Zealand bee pollen when the bee pollen was imported from China)
- *Commerce Commission v New Zealand Nutritionals (2004) Ltd* [2016] NZHC 832 (imported goats milk labelled as made in New Zealand when it was only blended and packaged in NZ)
- *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC (alpaca rugs from overseas re-labelled as made in New Zealand)
- *Commerce Commission v Mi Woolies Ltd* DC CHCH CRI-2012-009-009069 [31 July 2013] (sheepskin footwear labelled as made in New Zealand when the footwear was in fact manufactured entirely in China)
- *Commerce Commission v Prokiwi International Ltd* DC Christchurch CRI-2010-009-009397, 9 August 2010 (imported soaps and skincare products sold with New Zealand depictions on the labels)
- *Commerce Commission v Knight Business Furniture Ltd* DC Palmerston North CRN 06043500833-840, 14 September 2007 (office chairs labelled as made in New Zealand when the chairs were only assembled in New Zealand and major components were manufactured overseas)
- *Commerce Commission v Brownlie Brothers Limited* DC Napier CRI 2003-041-003200 [29 March 2004] (orange juice was labelled and marketed as made from New Zealand and/or Australian fruit, when in fact it contained imported concentrate)
- *Marcol Manufacturers Ltd v Commerce Commission* [[1991] 2 NZLR 50 (imported leather jackets re-labelled as made in New Zealand)
- *Commerce Commission v Parrs (New Zealand) Souvenirs Ltd* (1990) 3 TCLR 431 (imported sheep souvenirs labelled as made in New Zealand)

consumers' assumptions about the origin of a product appear very dependent on the nature of the product, common knowledge about the product and the facts accompanying it when offered for sale.

41. In our experience, consumers appreciate that New Zealand relies heavily on imported products and that due to our climate and size, food is often imported from overseas. For example, as a generalisation, it may be that many customers assume that fresh meat offered for sale is from New Zealand unless stated otherwise. The same is unlikely to be true if the product offered for sale is a tropical fruit, given that common knowledge will suggest that New Zealand not usually a producer of tropical fruit due to its climate.
42. Additionally, we do not agree that the absence of an origin label is likely to be misleading and deceptive. There is presently no requirement for country of origin labelling for the majority of products sold in New Zealand. Legal precedent establishes that silence or omission does not usually give rise to a breach of the Fair Trading Act (**FTA**), except in cases where there is a positive duty to provide information or where a half-truth is represented. Neither of these grounds will be present where a retailer simply omits to make a representation as to where the product is from. Most cases which we have prosecuted for misleading representations as to country of origin have involved either a misleading express representation as to country of origin (for example, that a product is Made in New Zealand when it is not) or misleading inferences drawn from packaging or advertising such as photographs of New Zealand scenery or the inclusion of a New Zealand flag.

Efficient enforcement of requirements to label

43. The Bill as drafted includes mandatory requirements to label single component foods, as recorded in clauses 6 (packaged foods) and 7 (unpacked foods.)
44. However, as drafted the Bill creates no offence for failing to label. Clause 9 creates offences only for misleading labels, not for failure to label. We consider that this is an omission that should be rectified if the Bill progresses, otherwise the objectives of the Bill could be readily undermined by traders who would face no sanction for non-compliance.
45. If enforcement of these mandatory requirements is intended, in our view the Ministry of Primary Industries (**MPI**) is best placed to efficiently enforce the requirements, as it currently inspects and regulates other elements of food sale and safety through premises inspections and audits under the Food Act 2014.

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- *Farmers Trading Company Ltd v Commerce Commission* (1988) 3 TCLR 370 (clothing made overseas and sold with made in New Zealand labels)
 - *Commerce Commission v Kimberley's Fashions Ltd & Anor* (1989) 3 TCLR 405 (imported leather jackets represented as made in Christchurch).

46. Where MPI considers, through its inspections, that there may be misleading representations, these could be referred to us by it for investigation under existing provisions of the FTA (discussed further below). To make this process simple, we could agree a process with MPI for handling referrals, whether informal or formal through a documented Memorandum of Understanding. We could then investigate any misrepresentation issues in accordance with the processes outlined in our Competition and Consumer Investigation Guidelines and take appropriate enforcement action in accordance with our Enforcement Response Guidelines.⁶

Duplicate offences is undesirable

47. We do not consider that it is desirable to enact clause 9 (Offences) as it is drafted, for the following reasons:
- 47.1 The offences that are proposed (clauses 9(1) and 9(2)) duplicate existing offences already found in the FTA.
- 47.2 Section 13(j) of the FTA specifically prohibits traders from making false or misleading representations concerning the place of origin of goods. This offence squarely extends to cover food representations of the kind that would be covered by clause 9 of the Bill. Indeed, we have prosecuted a number of cases, including food related cases, under this provision in the past.
- 47.3 A more general offence provision, section 10 of the FTA, prohibits traders from engaging in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods. The country of origin of food is usually considered in law to be part of the “nature” or a “characteristic” of the food.⁷
48. We therefore invite the Committee to consider further whether the existing law is sufficient to address misrepresentations on labels without duplication through clause 9 of the Bill.

Differences that would apply as between the duplicate offences

49. If enacted as drafted, clause 9 would also introduce undesirable inconsistencies with the FTA that would be confusing to traders and create enforcement difficulties:
- 49.1 **Penalty:** clause 9 would enact much lower penalties for these kinds of offence than those available under the duplicate offences in the FTA. For misleading conduct that breaches sections 13(j) and/or 10 of the FTA,

⁶ Our Competition and Consumer Investigation Guidelines are available at <http://www.comcom.govt.nz/the-commission/commission-policies/competition-and-consumer-investigation-guidelines/>. Our Enforcement Response Guidelines are available at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>

⁷ *Commerce Commission v New Zealand Nutritionals (2004) Ltd* [2016] NZHC 832; and *Commerce Commission v Brownlie Brothers Limited* DC Napier CRI 2003-041-003200 [29 March 2004]

companies can be fined up to \$600,000 per breach and an individual can be fined up to \$200,000. We consider maximum penalties of this scale to be appropriate for misleading conduct, where potentially large volumes of sales may be affected. But under clause 9, the maximum penalties would be \$10,000 - \$50,000 for companies and \$5,000 - \$10,000 for individuals. Maximum penalties at this level might be suitable for failures to label, but seem to us low for offences of misleading labelling which (as above) may affect many sales.

- 49.2 **Elements of proof:** the FTA offences are strict liability offences, meaning that we do not need to establish trader intent. The clause 9 offences do not have an intent component, but the penalties provided have a different maximum depending on whether intent was present (clauses 9(3) and 9(4)). This is in our experience unusual. Ordinarily, the maximum penalty applicable does not depend on the state of mind of the offender, but under usual sentencing principles the court will consider intent as an aggravating feature of offending that is capable of increasing the penalty imposed.
50. In our view the law is more likely to be successful and achieve its objectives if traders are clear about the elements of any offence and the applicable sanctions. Any uncertainty on these points arising from the duplication of offences, or inconsistency with other similar offences, is undesirable.

Enforcement overlap would need clarity

51. As indicated above, as the Bill is currently drafted MPI would be enforcing offences relating to misleading conduct that also currently fall within our FTA remit.
52. If the Committee intends that outcome, it would be best to provide for formal or informal enforcement cooperation with MPI so as to avoid over-enforcement or under-enforcement as between the agencies. Some precedent already exists for formalisation of overlap arrangements.⁸
53. If the Committee intends MPI to have an enforcement function in relation to misleading labelling (as well as for failure to label which could be provided as a separate offence, as noted above), with penalties falling below the FTA maxima, it would be desirable for the Committee to consider granting MPI an Infringement Fee regime for these offences.⁹ This would allow MPI to deliver quick and low-level offence notices at the point of inspecting premises, which may be considered efficient.

⁸ Under the Financial Markets Conduct Act 2013 the Financial Markets Authority (**FMA**) became the primary regulator of misleading and deceptive conduct in relation to financial products and services – responsibilities that fell within our general FTA enforcement remit. Section 48P of the FTA was enacted, allowing the FMA to grant the Commission consent, if the Commission wished to take a case. These provisions, which are now underpinned by a Memorandum of Understanding between the FMA and the Commission, help to ensure that the agencies do not unnecessarily duplicate enforcement effort and impose unnecessary cost and difficulty on financial providers.

⁹ MPI presently has the ability to issue infringement notices under section 218 of the Food Act 2014.

Resource and funding implications

54. Whichever agency is the preferred enforcer of the regime (or each aspect of the regime), the regime may have resourcing implications and create a need for accompanying funding.
55. While the Commission is capable of taking cases under such a regime, it does not currently have a programme of work dedicated to food country of origin mislabelling. Food claims more generally (as to origin, composition, benefits etc) currently fall within our focus on “credence goods”, which are goods where the customer must take product claims on trust because it is not able or practicable for it to know the truth of the claims. We bring cases on origin claims, but to date few cases have concerned single origin foods.¹⁰
56. The ability of an agency to expeditiously deal with the proposed offences will also, in part, relate to the powers the agency has to compel the production of information relevant to the detection of offences and enforcement of the law. In this context, this would include evidence regarding production or import of the food product at issue. The Commission has extensive statutory powers to compel parties to provide us with documents and information, to attend interviews and to obtain warrants to undertake searches for information. It would be appropriate to consider the extent of MPI’s powers to investigate (current or proposed), when shaping the regime so that it can be cost-effectively and efficiently enforced.
57. If the Bill is enacted and provides for overlapping enforcement by us and MPI, or if each agency has responsibility to enforce different aspects of the proposed law, it would in our view be highly desirable to explicitly provide for information-sharing between those agencies.¹¹

Further information

58. We are available to speak to the Committee about our submission if it requires any clarification or wishes to discuss our recommendations further. To arrange a meeting, please contact Yvette Popovic, Acting Advocacy Manager on 04 924 3771 or by email at yvette.popovic@comcom.govt.nz.

Yours sincerely

Antonia Horrocks
General Manager – Competition

¹⁰ See: *Commerce Commission v Sunfrost Foods (NZ) Ltd* (1989) 3 TCLR 518 (imported tomatoes canned in NZ and labelled as product of NZ); and *Commerce Commission v Honey New Zealand (International) Ltd* DC Auckland CRN-2009-004-504773 to 2009-004-504775, 27 May 2011 (powdered royal jelly labelled as made in NZ when ingredients were imported from China).

¹¹ Useful precedents can be found in statutes such as section 30 of the Financial Markets Authority Act 2011 or, more narrowly, in section 48A of the FTA.